Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA

For The Period
From April 1, 1955
Through June 30, 1955
VOLUME 79

JOHN PATTERSON, Attorney General

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QUARTERLY REPORT

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Volume No. 79

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1955, through June 30, 1955, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

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OPINIONS

April 1, 1955

Hon. J. M. McCullough, Jr.
Commissioner
Board of Corrections
CAPITOL

Prisons and Prisoners—Convicts—Escapes.

A prisoner sentenced to hard labor for the county and confined in the penitentiary who escapes may be punished under the provisions of Title 14, Section 153, Code of Alabama 1940, as amended by Act No. 371, General and Local Acts 1951, page 664.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of March 16, 1955, is as follows:

"Your official opinion is requested on the following matter:

"Section 151, Title 14, Code of Alabama 1940, provides that any convict sentenced to imprisonment in the county jail or to hard labor for the county, who escapes from such confinement, upon conviction shall be sentenced for not more than six (6) months. Section 153, Title 14, Code of Alabama 1940 as amended, provides that an escapee from the penitentiary shall be punished by imprisonment for an additional term of not less than one (1) year.

"As you know, the penitentiary houses a large number of prisoners who have been sentenced to hard labor for the county. Therefore, if a prisoner sentenced to hard labor for the county and confined to Kilby Prison or one of the other penitentiaries escapes from such penitentiary is he to be punished for a felony or for a misdemeanor?"

Since the publication of the Penal Code of 1866, the provisions of what are now Sections 151 and 153 of Title 14, Code of Alabama 1940 (Section 153 being amended by Act No. 371, General and Local Acts 1951, page 664), have been worded substantially as they are today. The statutes which preceded Section 151, supra, have always been worded in part as follows: "Any convict sentenced to imprisonment in the county jail or to hard labor for the county. . . ." The statutes, which later became Section 153, as amended, supra have always been worded in part as follows: "Any convict who escapes or attempts to escape from the penitentiary or from any prison or any guard having him in charge. . . ."

Throughout all this time a distinction has been made in the punishment provided by the two sections. The punishment provided in what is now Section 151, supra, has always been less than that in the present Section 153, as amended, supra.

Prior to 1927 no county prisoners, prisoners serving sentences of imprisonment in the county jail or hard labor for the county, were sent to the State penitentiaries. In 1927 provision was made for county governing bodies to send their prisoners to State penal institutions. See Sections 96 and 97 of Title 45, Code of Alabama 1940.

At that time a provision was made that laws relating to State prisoners should also apply to county prisoners. See Section 94, Title 45, Code of Alabama 1940. Section 94, supra, was taken from Section 8, Act No. 72, General Acts 1927, page 52, which provided as follows:

> "Section 8. All and several, the statutes and laws now in force or hereafter enacted, regulating and controlling the State Convict Department and the State Board of Administration, and all rules and regulations of the State Board of Administration, and all pains and penalties, offenses, fines and forfeitures relative to the subject of convicts and convict treatment, shall apply in full force and effect as to county convicts kept and used by the State under authority of this Act insofar as the same are applicable and not otherwise expressly prohibited."

In my opinion, the legislature intended that county convicts sent to the State penitentiary be covered by the same laws and regulations which govern State prisoners.

In **Bradford v. State,** 149 Ala. 1, 42 So. 990, a prisoner sentenced to the penitentiary was confined in the county jail awaiting transfer when he escaped. The court held that, because he had been turned over to the sheriff for confinement in the county jail until he could be transferred to the State penitentiary, his escape was from the penitentiary and he could be punished under what is now Section 153, as amended, supra. In the case of a county prisoner who has been turned over to the State authorities to be treated as a State prisoner, under the provisions of Sections 94, 96 and 97, supra, it is my opinion that the same reasoning applies.

That prisoner, from the time of his transfer, is under the exclusive control of the State authorities in all respects as is a State prisoner. Therefore, if a prisoner sentenced to hard labor for the county and confined in a State penal institution escapes from such institution, he should be punished under the provisions of Section 153, as amended, supra.

Very truly yours,

JOHN PATTERSON,
Attorney General.

April 5, 1955

Hon. Leo H. Dennis
Executive Director
The Housing Authority of the City of Phenix City
Phenix City, Alabama

Housing Authorities — Municipalities — Taxation — Licenses — Exemptions — Refunds.

1. Automobiles owned and operated by a municipal housing authority created under the provisions of Title 25, Sections 7, et seq., Code of Alabama 1940, as amended, are exempt from ad valorem taxes, and such housing authorities are not liable for the license tax levied by Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 693(1), 1953 Cumulative Pocket Part, Code of Alabama 1940).

2. Refunds for such taxes already paid may be applied for under Title 51, Section 328, Code of Alabama 1940, and Title 51, Sections 848 and 849, Code of Alabama 1940, as amended by Act No. 544, General Acts 1943, page 533.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of February 2, 1955, is as follows:

"This is with reference to eligible State and County taxes and license tag for Local Housing Authority owned passenger car for which an opinion, by your office, is hereby requested.

"At a recent meeting in the Public Housing Administration's Atlanta Field Office, the Alabama represented Authorities stated that their Authority owned vehicles were treated the same as Municipal owned vehicles, from the standpoint of taxation and license tags.

"This Authority purchased a 1952 Ford ranch wagon on November 19, 1952, and since, has paid the following taxes:

"September 28, 1953 License Tag	$ 3.75
State & County Ad Valorem	21.00
"September 30, 1954 License Tag	3.75
State & County Ad Valorem	12.60
Total	$41.10

"It will be appreciated if you will advise as to whether any of the above listed payments are partially or fully refundable and what procedure to follow in establishing proper State license and tax expense on vehicles owned by this Local Authority."

Your inquiry, as I understand it, is whether or not the Housing Authority of the City of Phenix City is liable for ad valorem and license taxes on a passenger car owned and operated by it; and if not, how can said housing authority obtain a refund of such taxes already paid for the years 1953 and 1954.

It might be well to start by saying that municipal housing authorities, such as the one in question, are local agencies authorized under the provisions of Title 25, Sections 7, et seq., Code of Alabama 1940, as amended, and have been clearly held to be agencies of the municipality of which they are a part. **Brock et al v. City of Anniston et al,** 244 Ala. 544, 14 So. 2d 519; **In Re Opinions of the Justices,** 235 Ala. 485, 179 So. 535.

The proposition is clearly stated in **In Re Opinions of the Justices, supra,** as follows:

"The Housing Authority is to be a corporation brought into existence upon the order of a city government, public in nature, and charged with the duty of performing an important element of the police power of the city under whose sanction it shall come into existence. (Citing cases.)

". . . When the city is performing a governmental function, it is none the less so because it is done by the instrumentality of some administrative agency, such as a board, commission, or even a corporation set up for that purpose, created by or for the city's use in that connection.

"The mere fact that it is a corporation does not deprive it of the qualities of a governmental agency, nor of the immunities of the government for which it operates." (Citing cases.)

The foregoing being true, the next step is to examine the provisions of law, and specifically the pertinent taxing statutes, relating to the questions involved.

Section 91, Constitution of Alabama 1901, imposes the following prohibition as to ad valorem taxation:

"The legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries; . . ."

Title 51, Section 2, Code of Alabama 1940, as last amended by Act No. 953, General and Local Acts 1951, page 1626, provides that the following

persons and property shall be exempt from ad valorem taxation and none other:

"(a) . . . all property, real and personal, of the United States and this state, and of county and municipal corporations in this state; . . ."

Act No. 780, General and Local Acts 1951, page 1375 (Title 51, Section 701(1), 1953 Cumulative Pocket Part, Code of Alabama 1940), provides, inter alia, that "motor vehicles owned and used by the state, counties or any municipalities of this state shall not be liable for the payment of license taxes levied, but shall carry tags."

It appears, therefore, from a consideration of the above provisions, that the property of local housing authorities, such authorities being agents of a municipal corporation and a part thereof, in a broad sense, is exempt from any ad valorem tax; and that such authorities are not liable for the license tax levied on motor vehicles by Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 693(1), 1953 Cumulative Pocket Part, Code of Alabama 1940).—Cf. Quarterly Report of Attorney General, Vol. 42, page 34.

As to the proper method of obtaining a refund of the license taxes which have already been paid, as stated in your inquiry, my opinion is that you must make application to the Department of Revenue under the provisions of Title 51, Sections 848 and 849, Code of Alabama 1940, as amended by Act No. 544, General Acts 1943, page 533, within two years from date of payment.

To secure a refund of the ad valorem taxes in question you must proceed under Title 51, Section 328, Code of Alabama 1940, by filing your petition within two years of the date of payment.

Yours very truly,

JOHN PATTERSON,
Attorney General.

April 8, 1955

Hon. Reo Kirkland
Judge of Probate
Escambia County
Brewton, Alabama

Taxation—Deeds—Filing Tax.

Where two deeds conveying legal title to property are contained within the same instrument, each of the deeds is subject to filing tax required by the provisions of Title 51, Section 618, Code of Alabama 1940, as amended by Act No. 769, General and Local Acts 1953, page 1029.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1955, is as follows:

"I am enclosing herewith a copy of an instrument for recording which is self explanatory, together with copy of letter accompanying same. You will note that the First National Bank, Mobile, is requesting an opinion from you before we charge out the deed tax on this paper.

"Will appreciate an early reply, as I am waiting to file this instrument until the tax is determined."

There is a photostatic copy of a letter dated February 23, 1955, addressed to you by The First National Bank of Mobile, Alabama, attached to the instrument submitted to you for filing. This letter is as follows:

"Probate Judge of Escambia County,
Brewton, Alabama

"Dear Sir:

"We hand you herewith deed dated January 7, 1955, with the request that you record the same in your records.

"We wish to call your attention to the fact that this instrument is, in legal effect, two conveyances. One is made by The First National Bank of Mobile, as trustee under the will of Herman H. Wefel, Jr., deceased, to Dorothy W. Matthews; and the other conveyance is by Dorothy W. Matthews and husband to The First National Bank of Mobile, as trustee under Dorothy Wefel Matthews trust agreement of January 6, 1955.

Please take care to see that each such conveyance is appropriately indexed.

"We are not certain as to whether the state deed tax is applicable either to the transfer to Mrs. Matthews or the transfer by Mrs. Matthews. The transfer to her was made by the bank, as testamentary trustee, solely for the purpose of perfecting in her the title to which she became entitled upon the termination of a trust established under the will of Herman H. Wefel, Jr., deceased. The conveyance by Mrs. Matthews was made solely for the purpose of giving the bank, as trustee under an agreement of January 6, 1955, the legal title necessary to enable it to perform such trust agreement.

"We suggest that you secure a ruling with respect to the applicability vel non of the state deed tax in connection with each such transfer. Please do not hold up recordation until such ruling is obtained. We will guarantee payment of any deed tax which is ruled applicable, provided you let us know within a reasonable time as to the ruling. Please return the deed as soon as recorded and bill us cost and we will remit. Kindly acknowledge receipt on copy of this letter."

A request for an opinion has also been submitted by Honorable W. R. Stuart, Judge of Probate of Baldwin County, involving the identical question presented by you, and thus it is made to appear that the instrument is being offered for record in both counties.

The instrument constitutes, in legal effect and in fact, two separate conveyances of land; one in which The First National Bank of Mobile, as trustee under the will of Herman H. Wefel, Jr., deceased, is the grantor and Dorothy W. Matthews is the grantee; and the other one by which Dorothy W. Matthews, joined by her husband, are the grantors and The First National Bank of Mobile, as trustee under Dorothy Wefel Matthews trust agreement of January 6, 1955, is the grantee.

Title 51, Section 618, Code of Alabama 1940, as amended by Act No. 769, General and Local Acts 1953, page 1029, is quoted in pertinent part as follows:

"**No deed,** bill of sale, or other instrument of like character **which conveys any real or personal property** within this state, or **which conveys any interest in any such property,** except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record . . ." **(Emphasis** added.)

The First National Bank of Mobile, as trustee under the will of Herman H. Wefel, Jr., deceased, conveyed, in accordance with directions contained within the will and/or trust, three-fourths of the principal of the trust estate to Dorothy Wefel Matthews, her heirs and assigns forever. This conveyance has all the characteristics of a "deed" and conveys legal title from the grantor to the grantee. Since the conveyance by the grantor is made to comply with provisions of the testator's will, and actually constitutes a distribution of property to a beneficiary of the trust, it cannot be said that the transfer was made for the purpose of perfecting title in the name of the grantee, and therefore does not come within the purview of "exceptions" provided for in the statute.

(Mrs.) Dorothy Wefel Matthews, joined by her husband, Hooper W. Matthews, conveyed, on the same date and within the same instrument, the identical lands to The First National Bank of Mobile, as trustee under Dorothy Wefel Matthews trust agreement dated January 6, 1955. This conveyance likewise is characteristic of a "deed" and is so considered, and since the purpose of the conveyance is to place the legal title thereof in a trustee who is to have and to hold all of the same unto the said First National Bank of Mobile, as trustee, its successors and assigns forever, it cannot be contended that the transfer of title was for the purpose of perfecting title to said land. Since this conveyance does not come within the requirements of an "exception" in the statute, it must, in my opinion, be subjected to the deed tax imposed by Section 618, as amended, supra.

In an opinion of this office, reported in Quarterly Report of Attorney General, Vol. 53, page 124, it was held that a deed conveying property from a trustee to a beneficiary was subject to the deed filing tax provided by Section 618, as amended, supra. The opinion cited Quarterly Report of Attorney General, Vol. 1, page 117, and Vol. 35, page 100, and **Hawkins v. Pure Oil Company,** 232 Ala. 660, 169 So. 307, See also Quarterly Report of Attorney General, Vol. 16, page 251, and Vol. 8, page 132.

An opinion of this office, reported in Quarterly Report of Attorney General, Vol. 28, page 86, held that an instrument whereby legal title to real and personal property is conveyed to a national bank in trust for the benefit of the grantor, upon certain conditions, is subject to the deed filing tax, even though the grantor retains the beneficial interest therein; and the fact that the conveyance is made to a national bank exercising fiduciary powers pursuant to the Act of Congress (U.S.C.A., Title 12, Section 248(k)) is immaterial.

Another opinion, material for consideration here, involving an exchange of one piece of real property for that of another, held that each of the deeds involved was subject to the deed filing tax. See Quarterly Report of Attorney General, Vol. 17, page 270.

The question of taxability vel non depends upon whether or not the instrument offered for record does, in fact, convey or transfer any right, title or interest in property. **Hawkins v. Pure Oil Co., supra.**

It would appear to be clearly established that deeds of the type and character here presented are subject to the deed filing tax; but it must be pointed out that each of the cases enumerated above deals with a **single** conveyance contained within a single instrument. Here we are dealing with two conveyances contained within a single instrument. I do not find that the exact question here presented has arisen heretofore.

The deed filing tax is imposed upon the filing of a **"deed, bill of sale,** or other instrument of like character which conveys . . . any interest in any such property." (Emphasis added.) To assess the tax here against the **instrument** instead of assessing it against the **deeds, both deeds** embodied within the single **instrument,** would, in my opinion, be adding an alternative provision to the statute; but on the other hand, if the assessment is made against the **deed,** the conveyance, or transfer of title, it must necessarily be imposed upon each of the **deeds** contained in the instrument. There could be no justification, when two **deeds** are contained in a single instrument, for imposing the filing tax upon one of the deeds, to the exclusion of the other one. Each of these **deeds** conveys legal title of property. Each deed has a separate or different grantor and grantee. To assess or impose the tax upon the **instrument**, would not be a compliance, in my opinion, with the statute.

For the reasons set forth above, I am of the opinion that each of the deeds or conveyances contained within the instrument is subject to the tax provided by Section 618, as amended, supra.

Very truly yours,

JOHN PATTERSON,
Attorney General.

April 12, 1955.

Hon. Leslie L. Gwaltney, Jr.,
Superintendent of Insurance,
Department of Insurance,
CAPITOL.

Insurance—Opinions Overruled, Modified and Distinguished.

1. A rating procedure commonly known as "interstate rating" is not prohibited by the provisions of Act No. 132, General Acts 1945, page 133, or Act No. 133, General Acts 1945, page 145, so long as the rates resulting from such procedure do not unfairly discriminate between risks of the same class in this State involving essentially the same hazards.

2. Quarterly Report of Attorney General, Vol. 48, page 183, overruled.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of March 23, 1955, is as follows:

"On June 25, 1947, your office was requested to issue an advisory opinion for the guidance of the then Director of Commerce on the legality under the Alabama rating laws of a rating procedure commonly known as 'interstate rating'. An opinion based upon a specific illustration was issued under date of September 16, 1947 holding as follows:

"'. . . the application of rates arrived at by interstate rating (as set out by the illustration in your request) would defeat the intent of the statutes, and result in the application of rates in this State to risks involving essentially the same hazards which are unfairly discriminatory and are, therefore, in violation of Act No. 132 and Act No. 133.'

"I have been requested by the Alabama Inspection and Rating Bureau to review the question of interstate rating on a more comprehensive basis than was originally considered and to submit the matter to you for an opinion as to its legality under applicable Alabama law. Enclosed herewith is a copy of a letter from the Bureau setting forth pertinent information on the question and stating its position. We are also enclosing letters from the National Bureau of Casualty Underwriters and from the National Council on Compensation Insurance endorsing the position taken by the Alabama Inspection and Rating Bureau and presenting additional information on the subject.

"As you will readily understand, it is the duty of this Department in administering the insurance rating laws to pass upon all rate filings and to deny approval in any case in which there has been a failure to conform to the statutory requirements for rate making.

"In connection with this matter I wish to call your attention to the fact that although the 1947 opinion was based upon a specific illustration involving the use of average rates in the field of fire insurance, the opinion nevertheless includes a reference to the casualty rate regulatory law in its conclusion. This has been a matter of serious concern to casualty insurers. Since no factual data concerning the application of casualty rating plans involving the principle of interstate rating was before the Attorney General at the time of the 1947 opinion, it is requested that you make clear whether such a conclusion in this regard was intended to be drawn.

"In view of the foregoing, it is respectfully requested that you issue an advisory opinion for the guidance of this Department stating whether the Alabama insurance rating laws permit this Department to aprove rate filings which may involve application of the principle of interstate rating."

The law requires that every rating organization, and every insurer which makes its own rates, shall make rates that are not unreasonably high or inadequate for the safety and soundness of the insurer. These rates must not **unfairly discriminate between risks in this state** involving essentially the same hazards. This statement of the applicable law applies to insurance which fire insurance companies are authorized to write and also to companies writing casualty and surety insurance. Act No. 132, General Acts 1945, page 133; Act No. 133, General Acts 1945, page 145.

The supervisor of the Bureau of Rates has authority to have altered any rating system which produces rates which are unfairly discriminatory between risks in this state involving essentially the same hazards. Act No. 132 and Act No. 133, supra; Quarterly Report of Attorney General, Vol. 48, page 180.

These acts define a rating system or rating plan to mean every schedule, class, classification, rule, guide, standard, manual, table, rating plan, or compilation, by whatever name described, containing the rates used by any organization or insurer or used by them in ascertaining a rate.

Insurance companies and rating organizations are authorized, in making rates, to give consideration to past experience within the state and without the state when necessary and to prospective loss both within and without the state when necessary.

Act No. 132 and Act No. 133, supra, place the duty upon the supervisor of the Bureau of Rates to determine whether rating plans produce rates which are not unreasonably high and are not inadequate for the safeness and soundness of the insurer. It is his duty to see that rates do not unfairly discriminate between risks in this State.

Unfair or unjust discrimination means the different treatment of persons of the same class under like or similar conditions. **Lindenburg v. American Railway Express Co.,** 88 W. Va. 439, 106 S. E. 884; **Reed v. General Ins. Co., of America, et al,** 265 Ky. 206, 96 S. W. 2d 259. Lack of uniformity in the rate charged is not necessarily unlawful or unfair discrimination, and is not prima facie unreasonable. Discrimination to be objectionable must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges.

It seems to me that there may be a reasonable classification for those who have risks both within and without the state and another classification for those whose risks are wholly within the state. If this be true, then the system of interstate rating does not per se result in unfair discrimination.

The Alabama Inspection and Rating Bureau defines "interstate rating" as follows:

> "What is commonly known as 'interstate rating' is nothing more than a rate making procedure which gives appropriate recognition to all relevant factors affecting the subject of insurance outside the state as well as within the state in the development of proper rates for interstate risks. In the field of fire insurance such risks are commonly called interstate multiple location risks, since they involve exposures or locations in more than one state. Interstate rating takes such risks as it finds them. For example, in the development of the average rate it takes into account all the exposures of the risk wherever located. This method is essentially the same as that used in the rating of multiple location risks which are wholly intrastate in that in each case an average rate is developed for all the locations of the risk. As you know, the development of average rates is a common procedure which has long been approved in Alabama. In the case of rating interstate risks, the sole difference in this regard is that the risks' out-of-state locations are given due consideration instead of being ignored in the rating."

It appears from the information submitted with your request that the rating procedure commonly known as "interstate rating" is being used in a large majority of the states whose laws are similar to those of Alabama. It further appears that the Alabama Inspection and Rating Bureau feels that the generally accepted principle of interstate rating is wholly consistent with common statutory requirements that rates shall not be unfairly discriminatory. My research has revealed no court decisions either condemning or approving the principle of interstate rating as defined above. There may be some decisions, but I have not been able to find them.

In view of what has been said above, it is my opinion that the better practice would be for this office to take the position that under Act No. 132 and Act No. 133, supra, interstate rating does not per se result in unfair discrimination between risks of the same class in Alabama.

Since the views expressed in the opinion reported in Quarterly Report of Attorney General, Vol. 48, page 183, are not in accord with the views herein expressed, it is my opinion that said opinion should be overruled.

Yours very truly,

JOHN PATTERSON,
Attorney General.

April 20, 1955

Hon. Ashford Todd
Judge of Probate
Madison County
Huntsville, Alabama

Taxation—Mortgages—Filing Tax.

1. Entire amount of mortgage filing tax should be assessed against mortgagee, as owner, when presented for recordation, notwithstanding the fact that the mortgagee has made and entered into participation agreement with another (a national bank) when such agreement is not incorporated by reference into and made a part of said mortgage.

2. Mortgage in question being for a definite amount does not come within the exception of Title 51, Section 619(b), Code of Alabama 1940, as amended by Act No. 770, General and Local Acts 1953, page 1031.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of January 28, 1955, is as follows:

"Re: Mortgage from Hillandale, Inc. to Commerce Union Bank, Nashville, Tenn.

"Pursuant to the authority of Code of Alabama 1940, Title 55, Section 240, as amended, I request an official opinion of the Attorney General as to the mortgage tax due on the following set of facts:

"On Nov. 15, 1954, the original of the enclosed copy of the mortgage from Hillandale, Inc., to Commerce-Union Bank, Nashville, Tenn., and marked 'Exhibit A' for identification, was filed for record in this office. The stated consideration, as shown is, $817,050.00. Incident to the filing of said original mortgage, I assessed the mortgage tax on same to be $1,225.65.

"The mortgagee, Commerce-Union Bank, takes the position that as there is an Agreement of Participation between it (a Tennessee State Banking Institution or Corporation) and the National Bank of Commerce, Memphis, Tenn., a National Banking Corporation, to the extent that the National Bank of Commerce of Memphis is to participate in advancing the proceeds of the loan secured by the aforesaid mortgage on a 50%

basis, that upon filing the Agreement of Participation for record, only 50% of the amount of the tax I assessed would be due. This is so, the mortgagee, Commerce-Union Bank, claims, because the effect of the Agreement of Participation is the same as if two separate mortgages were filed, each for one-half of the stated amount in the mortgage; one by the State Banking Corporation, Commerce-Union Bank, and the other by the National Bank, National Bank of Commerce of Memphis. A copy of the Agreement of Participation is enclosed and marked 'Exhibit B' for identification.

"I am also enclosing a copy of an Agreement between Commerce-Union Bank and Hillandale, Inc., marked 'Exhibit C' for identification, governing the disposition of the proceeds of the loan secured by the mortgage, and showing that the loan secured is a construction loan. As this mortgage secures a construction loan and the proceeds are to be disbursed over a period of time, and as needed, and the indebtedness incurred at the time of filing the mortgage being very small in comparison with the stated consideration in the mortgage, the mortgagee is of the opinion that Title 51, Section 619(b) of the Code of Alabama 1940 is applicable, and the tax on the stated consideration in the mortgage is not due on the date of filing.

"Your specific opinions are requested as to the following questions:

"1. What amount of tax should I assess against Commerce-Union Bank on the mortgage filed for record, 'Exhibit A' herewith, if the Agreement of Participation between National Bank of Commerce, Memphis, Tenn., and Commerce-Union Bank of Nashville, Tenn., 'Exhibit B' herewith, is filed for record along with the mortgage?

"2. Does Title 51, Section 619 (b) of the 1940 Code of Alabama apply in this case; and if so, what steps should the mortgagee take to ascertain the amount of the tax due at the time of the filing of the mortgage?

"The mortgagee is of the opinion that the letter and the opinion of Hon. Thomas S. Lawson, as Attorney General, to Hon. Thomas W. Jones as Judge of Probate of Madison County, dated July 9, 1942, is not applicable in this case as in that letter the Participation Agreement referred to between the mortgagee and the Federal Agency was conditional; whereas in this case the participation by the National Bank of Commerce, Memphis, Tenn., on a 50% basis is absolute and unequivocal."

In reply to your first question, I am of the opinion that the entire amount of the tax imposed by the provisions of Title 51, Section 619, Code of Alabama 1940, as amended by Act No. 770, General and Local Acts 1953, page 1031, should be assessed against the mortgagee, Commerce Union Bank, Nashville, Tennessee, as owner of the mortgage.

The mortgage contract is one made by and between Hillandale, Inc., the mortgagor, and Commerce Union Bank, the mortgagee. The mortgage

is given to secure payment of a note given by Hillandale, Inc., to Commerce Union Bank in the principal sum of $817,050.00. The stockholders of Hillandale, Inc., have endorsed said note, and the mortgage and note bear date of November 15, 1954. The mortgage is referred to as Exhibit "A." There is an express stipulation that no terms or conditions contained in the mortgage can be waived, altered or changed except as evidenced in writing, signed by the mortgagor and mortgagee.

There is another stipulation included within the mortgage pertinent to mention here, by which an agreement, referred to as Exhibit "C," dated November 15, 1954 (same date as that of the mortgage), was incorporated by reference and thus made a part of said mortgage insofar as the mortgagor's and mortgagee's relationship was concerned. This agreement had as its primary purpose the method and manner or the plan for distribution of the funds borrowed by the mortgagor.

There is still another agreement in which the mortgagee is interested, referred to as Exhibit "B." This agreement, dated November 10, 1954, is made by and between the Commerce Union Bank, Nashville, Tennessee, and the National Bank of Commerce, Memphis, Tennessee. The primary purpose of this agreement is to set out a plan of loan participation, each with the other, in advancing funds borrowed by the mortgagor from the mortgagee. It is to be observed that Exhibit "B" is not incorporated by reference within the mortgage contract made and entered into by the mortgagor and mortgagee, and for aught that appears it is a collateral agreement made by the parties without the knowledge or consent of the mortgagor.

While there can be no doubt that the agreement (Exhibit "B") provides that the National Bank of Commerce is, by arrangements therein provided, reimbursing the Commerce Union Bank for fifty percentum of the total funds advanced by the Commerce Union Bank to the mortgagor, the fact is that there is no privity of contract whatever by and between the mortgagor and the National Bank of Commerce. The mortgage and note are made payable to the Commerce Union Bank, and all advances of loan funds are to be made to the mortgagor or its agents by the said Commerce Union Bank. The agreement, referred to as Exhibit "C" and incorporated by reference within the mortgage refers to Commerce Union Bank as the mortgagee; and the mortgagor, to better secure the debt, has pledged all of its stock to the Commerce Union Bank, as mortgagee.

If, in the question at bar, the note and mortgage were payable to both banks here involved, as mortgagees, there would be no problem in determining that the tax would be imposed upon the mortgage interest of the Commerce Union Bank; and the mortgage interest of the National Bank of Commerce, a national bank, would be exempt from the tax. **Federal Land Bank v. Crosland, 261 U.S. 374, 43 S. Ct. 385, 67 L. Ed. 703.** Such, however, is not the case.

In an opinion reported in Quarterly Report of Attorney General, Vol. 46, page 88, it was held that, where mortgage executed to a state bank and

a national bank as **joint mortgagees** is filed for record, the amount of mortgage filing tax is to be determined by the amount of money loaned by each institution. The law has been subsequently changed as it relates to the distinction made between Alabama state chartered banks and national banks, which is immaterial to the subject here. (Act No. 181, General Acts 1947, page 66.)

In another opinion of this office reported in Quarterly Report of Attorney General, Vol. 15, page 285, it was held that a mortgage given to secure a debt due the Tennessee Valley Bank, a state banking institution, was subject to the privilege or filing tax required by provisions of the statute, notwithstanding the fact that the Reconstruction Finance Corporation, an agency of the United States Government, was furnishing ninety percentum of the loans made to the mortgagor by the mortgagee bank.

It is interesting to observe that another official opinion was issued by this office, this one being addressed to your predecessor in office, Hon. Thomas W. Jones, dated July 29, 1942 (Quarterly Report of Attorney General, Vol. 28, page 84), involving facts similar indeed to those presented here and in which the Commerce Union Bank was there, as here, the mortgagee or one of the mortgagees. It was there held that the tax was due upon recordation of a mortgage made to secure a debt in favor of the "Commerce Union Bank and/or Reconstruction Finance Corporation," notwithstanding the participation agreement made by the bank and the Reconstruction Finance Corporation by which the Reconstruction Finance Corporation agreed that, upon demand being made by the bank, the R. F. C. would purchase a two-thirds interest in the mortgage and loan secured thereby; and agreed also that it might, upon five days' notice in writing, at its option, purchase such participation in said loan.

I am of the opinion, therefore, that the mortgagee, Commerce Union Bank, a state bank chartered under the laws of the State of Tennessee, must pay the privilege or license tax required by the provisions of Section 619, as amended, supra, when the mortgage is offered for recordation; and this, notwithstanding the provisions contained in the agreement of participation (Exhibit "B"), wherein it is clearly shown that the two banks are planning to participate in the loan, share and share alike, up to the maximum amount loaned by the mortgagee to the mortgagor.

I am of the opinion that your second question should be answered in the negative.

Section 619 (b), as amended, supra, in pertinent part is quoted as follows:

"If any part of the indebtedness which the **mortgagor or debtor in any other instrument** is authorized to incur under the terms of the instrument has not been, or will not be, presently incurred, at the time such instrument is offered for record, the tax shall be paid on the amount of indebtedness presently incurred, . . ." (Emphasis supplied.)

In the matter here involved there is **no other instrument** which authorizes the mortgagor or debtor to incur indebtedness under terms of the mortgage; nor are there any provisions contained within the mortgage itself which contemplate any definite additional amounts of indebtedness.

The mortgage is not of the type commonly known and referred to as a "blanket mortgage," nor is it a deed of trust executed to secure a bonded indebtedness. On the other hand, it is a mortgage on real and personal property given to secure the payment of a demand note in the sum of $817,050.00.

In the case of **Prestridge et al v. Garry,** 251 Ala. 181, 36 So. 2d 328, the appellee submitted argument to the effect that Section 619 (b), supra, was not applicable because there was **no other instrument** authorizing the mortgagor to incur further indebtedness and because Section 619(b), supra, was designed to cover blanket mortgages or deeds of trust executed for securing bonded indebtedness in which the proceedings authorizing such indebtedness furnished full data and information for determining the amount of the indebtedness. Our Supreme Court, in affirming the lower court's decision, said:

> "We are of opinion that this contention is sound and that the decree overruling the demurrer to the bill is free from error."

In the question at bar, the mortgage is not given to secure future indebtedness but to secure payment of a promissory note due on demand not later than twelve months from date and in the principal sum of $817,050.00. The agreement (Exhibit "C") does not furnish full data for determining the amount actually advanced to the mortgagor, but provides that, upon option of the mortgagee, the amounts to be advanced by the mortgagee to the mortgagor, in installments, may be changed or regulated within the discretion of the mortgagee bank. (Par. 1, Exhibit "C.") See also Quarterly Report of Attorney General, Vol. 74, page 18.

The implication to be gained from the court's language used in the **Prestridge et al v. Garry** case, supra, would, in my opinion, expressly preclude the provisions of Section 619(b), as amended, supra, from being applicable to the mortgage in question.

Very truly yours,

JOHN PATTERSON,
Attorney General.

May 5, 1955

Hon. L. W. Gentry
Director, Department of Commerce and
Savings and Loan Commissioner
CAPITOL

Commerce, Department of—Banks and Banking—Savings and Loan Associations.

Under the provisions of Title 5, Section 220, Code of Alabama 1940, as amended by Act No. 107, General Acts 1943, page 107, a directorship in a savings and loan association is terminated when the director's net equity above loans of all accounts of the association held by him aggregate less than the minimum required to be eligible for election as a director.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1955, is as follows:

"One of the State chartered Savings and Loan Associations under the supervision of this Department has in its loan portfolio a mortgage secured by real estate executed by one of the Directors with an unpaid balance of $10,846.00. Under the provisions of Title 5, Section 220, as amended, all Directors are required to own a certain number of shares in the Association unencumbered. The total resources of the Association in question on the date of the examination amounted to $2,235,726.61. Under the provisions of Title 5, Section 230, Associations are authorized to make loans to the Officers and Directors provided the mortgage is secured by real estate and the property is owned and occupied by such Director as a residence. The Director of this Association on the date of the examination, owned investment shares in the amount of $1,572.00. The question we ask that an opinion be rendered on is as follows:

"Has the Director been disqualified to serve by reason of the fact he has executed a real estate mortgage to the Association in an amount to exceed his share investment."

The answer to your question is in the affirmative.

Title 5, Section 220, Code of Alabama 1940, as amended by Act No. 107, General Acts 1943, page 107, provides in pertinent part as follows:

". . . In order to qualify as a director, a member of an association must hold an account, the participation value of which is at least five

hundred dollars, provided that if the assets of the association exceed five hundred thousand dollars, such member must hold an account, the participation value of which is at least one thousand dollars; and provided further, if the assets exceed two million five-hundred thousand dollars, the participation value of such account must be at least two thousand dollars. A director shall cease to be a director when he ceases to be a member, or when the net equity **above loans** of all accounts of the association held by him aggregate less than the minimum required to be eligible for election as a director, and his office shall automatically become vacant, provided no action of the board of directors shall be invalidated through the participation of such director in such action. . . ." (Emphasis supplied.)

You stated in your request for an opinion that the total resources of this particular savings and loan association on the date of the examination was $2,235,726.71, and that one of the directors thereof held an account with a value of $1,572.00. However, this director also had a loan outstanding in the amount of $10,846.00.

You will note that Section 220, supra, provides that a director ceases to be a director when the net equity above loans of all accounts of the association held by him aggregate less than the minimum required to be eligible for election as a director. The minimum required to be held in order to be a director of this association would be a net equity of $1000.00.

In the factual situation under consideration, the director had an account worth $1,572.00, which, without more, would seem to qualify him as a director. But, you will notice, this director had outstanding a loan in the association in the amount of $10,846.00, which would leave him no equity in this association, thereby disqualifying him as a director.

It is, therefore, my opinion that the director of the savings and loan association in question is disqualified from serving as said director because his net equity above loans of all accounts of the association held by him aggregate less than the minimum required to be eligible for election as a director.

Very truly yours,

JOHN PATTERSON,
Attorney General.

May 5, 1955.

Hon. Clyde C. Cargile,
Judge of Probate,
Fayette County,
Fayette, Alabama.

Counties — Hospitals — Taxation — Constitutional Amendments — Opinions Overruled, Modified or Distinguished.

1. Under the provisions of Amendment No. LXXII and Amendment No. LXXVI, Constitution of Alabama 1901, the proceeds of the special tax authorized by Amendment No. LXXII may be used to contribute to the building and maintaining of a proposed district tuberculosis sanatorium under proper contractual relationships with the counties in the district and in cases where the tax is not voted specifically for public hospital facilities located in the county.

2. Fayette County may legally turn over to the State Health Department five hundred dollars per month from the special tax levy authorized by Amendment No. LXXII, supra, for use in Fayette County, and for purposes authorized by Amendment No. LXXII, supra, and Amendment No. LXXVI, supra.

3. Quarterly Report of Attorney General, Vol. 62, page 66, insofar as it pertains to the question here under consideration, is hereby overruled.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of April 20, 1955, is as follows:

"A request that Fayette County contribute to a Board of Trustees of a District II Tuberculosis Sanatorium at Tuscaloosa, Alabama, has been received.

"Attached to this letter is a copy of the Ballot which was given a favorable vote in Fayette County November 2, 1954.

"1. Can the proceeds from this Special Tax be used to contribute to the building and maintaining of the proposed Tuberculosis Sanitorium in this District?

"2. At present we are sending $500.00 per month to the State Health Department as our contribution to the Health Program in Fayette

County. Could this monthly contribution be a legal expenditure from this Special Tax levy?

"Your prompt attention to these two questions will enable us to expedite matters of a rather urgent nature."

Prior to the ratification on December 21, 1949, of Amendment No. LXXVI, Constitution of Alabama 1901, the Supreme Court of Alabama had held that the proceeds from a tax levied under the provisions of Amendment No. LXXII, Constitution of Alabama 1901, could not be used for a district tuberculosis sanatorium operated under the provisions of Act No. 287, General Acts 1945, page 474, whether the sanatorium was located in or out of the county.

In reaching this conclusion, the Supreme Court said:

". . . we are of opinion that the hospital acquired and maintained under the provisions of the amendment and with the funds which it authorizes must be a county institution located within the county, operated under the supervision of the county board or such other agency as the legislature may prescribe." **In Re Opinion of the Justices,** 252 Ala. 194, 41 So. 2d 559.

To like effect is the opinion of this office reported in Quarterly Report of Attorney General, Vol. 62, page 66, where it was held that the Hospital Board of Marshall County could not contribute any part of the tax levied under the provisions of Amendment No. LXXII, supra, to aid in the construction of a tuberculosis sanatorium located at Gadsden, Alabama.

The opinion of the Supreme Court referred to above was, as stated, rendered before the passage of Amendment No. LXXVI, supra, and is no longer the law with reference to the purposes for which the proceeds from the tax may be used in view of the provisions of Amendment No. LXXVI, supra, which amendment, in my opinion, was passed to avoid the limited and restricted use of said tax funds as held by the Supreme Court.

The opinion of this office reported in Volume 62, page 66, supra, which was rendered after the passage of Amendment No. LXXVI, supra, did not, in my opinion, give consideration to the provisions of this amendment.

It is a well known fact that in a number of counties in the State special taxes for hospital and public health purposes had been authorized by a majority vote of the people before the adoption of Amendment No. LXXVI, supra. The wording of the question on the ballots used in those elections is, in many instances, identical with the wording on the official ballot submitted with your request. This wording is as follows:

"Shall the County of Fayette be authorized to levy annually, commencing with the levy for the tax year of the county beginning October

1, 1954, in addition to all other taxes authorized by law, a special county tax, not exceeding four mills on each dollar of taxable property in the county, to be used solely for acquiring, by purchase, lease, or otherwise, constructing, operating, equipping, or maintaining county hospitals, or other public hospitals, non-profit hospitals and public health facilities?"

Amendment No. LXXVI, supra, provides:

"In each instance in which a special county tax for any one or more of the purposes included within the meaning of the term 'public hospital purposes' has heretofore been authorized at any election held in a county pursuant to the provisions of any amendment to the constitution heretofore adopted, all provisions of this amendment shall be applicable in said county to the same extent as if said election had been held after the adoption of this amendment."

The amendment further provides:

"Each county in which the tax shall be voted, and in the event a public corporation shall have been designated as the agency of such county pursuant to the provisions hereof then said public corporation, shall have the power to contract with any other county or similar public corporation with respect to the acquisition by purchase, lease, or otherwise, and the construction, equipment, operation, and maintenance of public hospital facilities outside of the county and within any zone or region of which the county may be a part, and which may have heretofore been established or may hereafter be established for public hospital purposes by the legislature or by any agency designated by it, the obligations of such contract to be payable solely out of the proceeds of said tax; provided, that the proceeds of said tax shall not be used outside of the county for any purpose for which the proceeds could not be used in the county, **and shall not be used with respect to public hospital facilities located outside of the county if the tax is voted specifically for public hospital facilities located in the county.**" (Emphasis supplied.)

It is perfectly apparent, therefore, that the framers of Amendment No. LXXVI, supra, intended a broader and more comprehensive meaning to the words and phrases "or other public hospitals, non-profit hospitals, and public health facilities," as used in Amendment No. LXXII, supra, and as used on the ballots in elections held thereunder, than that given to them by the Supreme Court. This is true because Amendment No. LXXVI, supra, specifically authorizes the use of the tax funds for public hospital facilities outside of the county and within any zone or region of which the county may be a part, unless the tax is voted specifically for public hospital facilities located in the county.

The Supreme Court, in its said opinion, stated that the court was not clear as to what the framers of Amendment No. LXXII, supra, had in mind by the use of the words and phrases "or other public hospitals, non-profit

hospitals, and public health facilities." The intent has now been made clear, in my opinion, by Amendment No. LXXVI, supra, which states that the funds may be used for public hospital facilities outside the county. It is also clear to me that the framers of Amendment No. LXXVI, supra, did not regard the use of said words and phrases alone on the ballots as being a specific designation or earmarking of the funds for public hospital facilities located only in the county. On the contrary, it is my belief that they intended said words and phrases to include public hospital facilities located outside the county. If confinement to the county is desired, the ballots should so state.

The wording of the ballots used in Fayette County, Alabama, for the special tax election held on November 2, 1954, under authority of Amendment No. LXXII, supra, is, therefore, in my opinion, broad enough to include the use of said tax funds for the construction and maintenance of a district tuberculosis sanatorium.

Based upon the assumption that the Board of Trustees referred to in your request is one organized under the provisions of Act No. 287, supra, and assuming that Fayette County will enter into contractual relationship with the other counties in District IX relative to the construction and maintenance of the proposed tuberculosis sanatorium, I am of the opinion that your first question should be answered in the affirmative.

It is my further opinion that the opinion reported in Volume 62, page 66, supra, is in conflict with the views expressed herein, and insofar as it pertains to the question here under consideration, the same should be and is hereby overruled.

Amendment No. LXXVI, supra, provides that the proceeds derived from the tax may be applied to any one or more of the purposes for which the tax may have been voted. One of these purposes relates to operating, equipping, and maintaining public health facilities. If the use of the tax money by the State Health Department is for these purposes or for any purpose authorized by the two said constitutional amendments, then I see no valid objection to making the monthly contribution in question from the special tax levy.

So long as the money is properly used, it would, in my opinion, be a matter resting within the discretion of the county governing body as to whether or not it would be of greater benefit to the county to spend the money itself or spend it through the State Health Department. It is my opinion, therefore, that your second question should be answered in the affirmative.

Yours very truly,

JOHN PATTERSON,
Attorney General.

May 12, 1955

Hon. K. J. Griffith
Judge of Probate
Cullman County
Cullman, Alabama

Filing Tax—Mortgages—Taxation.

A statement of assignment of accounts receivable is not subject to the mortgage filing tax.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of April 16, 1955, is as follows:

"I would like to have an answer to the following question: (1) Under Title 39, Sub Section 208 and 209 on an Assignment of Accounts Receivable, are we to charge a mortgage tax on the instrument filed under this section?"

The statute to which your request for an opinion refers is Act. No. 338, General and Local Acts 1949, page 503 (Title 39, Sections 207-214, 1953 Cumulative Pocket Part, Code of Alabama 1940).

Act No. 338, supra, provides for the assignment of accounts receivable, fixes the rights and liabilities of the assignors and assignees of such accounts and of persons owing the same. Said statute also provides that constructive notice of the assignment of accounts receivable may be given by filing a statement in the office of the judge of probate of the county in which the assignor's principal place of business within this State is located.

The statement of assignment of accounts receivable must contain the names of the assignor and the assignee, and the principal place of business of each within this State, if any; and it must state that the assignor has assigned or intends to assign to the assignee one or more accounts receivable. A form of statement which is sufficient for the purposes of Act No. 338, supra, is set forth therein.

The mortgage filing tax is provided for in Title 51, Section 619, Code of Alabama 1940, as amended by Act No. 770, General and Local Acts 1953, page 1031, which section reads in part as follows:

". . . No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment

of any debt, **which conveys any real or personal property situated within this state, or any interest therein,** shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record . . . ." (Emphasis supplied.)

This office has repeatedly held that an instrument is not subject to the mortgage filing tax prescribed by Section 619, as amended, supra, unless said instrument conveys real or personal property. Quarterly Report of Attorney General, Vol. 60, page 14; Vol. 53, page 38; Vol. 24, page 55; Vol. 15, page 192; and Vol. 6, page 8.

As pointed out above, the statement of assignment of accounts receivable which is filed in the office of the judge of probate by virtue of Act No. 338, supra, merely shows that the assignor has assigned or intends to assign one or more accounts receivable to the assignee. It is obvious that said statement does not convey any real or personal property.

The premises considered, I am of the opinion that the statement of assignment of accounts receivable provided by Act No. 338, supra, is not subject to the mortgage filing tax prescribed by Section 619, as amended, supra.

Very truly yours,

JOHN PATTERSON,
Attorney General.

May 26, 1955

Hon. Walter B. Venters
County Solicitor
Lee County
Opelika, Alabama

Firearms—Uniform Firearms Act—Licenses.

1. Title 14, Sections 175 and 177, Code of Alabama 1940, as last amended by Act No. 784, General and Local Acts 1951, page 1378, forbids a person without a license to carry a concealed pistol onto the land of another, in the dash compartment of a motor vehicle, on his person on the highways or other publicly owned place. Conversely, a person with an unlimited license may carry the said pistol at any time and place. If the license is a qualified one, the pistol may be carried concealed only in accord with the qualifications of the license.

2. No license is needed to carry a pistol openly and unconcealed in a motor vehicle or on the person on the highways or other publicly owned place, or on the premises of another person if the person so carrying it is not one of those persons to whom the possession of a pistol is forbidden by Title 14, Section 174, Code of Alabama 1940, as last amended by Act No. 784, General and Local Acts 1951, page 1378.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of May 11, 1955, is as follows:

"In a case here in Common Pleas Court last Monday, two Highway Patrolmen testified in substance that they saw the defendant leaving a beer joint at midnight in a drunken condition and get into a car as a passenger. That they stopped the car and saw a hand place a pistol on the running board. That the defendant was from Chambers County and admitted that he did not have a pistol license.

"The Judge of said Court threw the case out because the State was not able to prove that the defendant had carried a concealed weapon, as charged in the warrant. It was held by the Court that Title 14, Section 175 of the Code of Alabama did not make it an offense to carry a pistol when same was not concealed. This being the Sec. 175 as amended.

"It would appear that Section 163 of the Code, Title 14, as amended is in conflict with 175.

"Your opinion as to the following questions is respectfully requested.

"1. May a person in this State carry a pistol upon premises not his own without a license? Meaning concealed or not concealed.

"2. May a person in this State carry a pistol in a motor vehicle on the seat or in the dash compartment, on public property or on property not his own?

"An early opinion would be appreciated as I have requested the Sheriff and the Justice of the Peace to hold any further charges pertaining to pistols as aforesaid, in abeyance pending your opinion."

The first question which you ask contains two questions. (a) May a person carry a concealed pistol on premises not his own without a license, and (b) may a person carry an unconcealed pistol upon premises not his own without a license?

It is my opinion that a person may not carry a concealed pistol anywhere off his own premises without a license. He may, however, carry an unconcealed pistol anywhere without obtaining a license.

Your second question contains four questions. The answer to them depends upon whether a license has been obtained and whether the pistol is carried concealed or unconcealed. First, a pistol, whether licensed or unlicensed, may be carried openly on the seat of a motor vehicle. An unlicensed pistol may not be carried in the dash compartment because to do so is in fact concealing the pistol.

An unlicensed pistol may not be carried concealed on public property or onto another person's property. But a licensed pistol may be carried concealed at any time or place if the license is an unlimited license. If said license to carry a pistol is a qualified license, the pistol may be carried concealed only in accordance with the terms of the qualifications. See Title 14, Sections 175 and 177, Code of Alabama 1940, as last amended by Act No. 784, General and Local Acts 1951, page 1378.

Finally, an unlicensed and unconcealed pistol may be carried on public property or on property of another person, as was pointed out in answer to question 1(b) above.

The status of pistols, either concealed or unconcealed, has varied considerably over the years from 1936 to the present. It is necessary to trace carefully the status of the law from the passage of the "Uniform Firearms Act" in 1936 to answer your questions and explain the reasons therefor.

Section 163 of Title 14, Code of Alabama 1940, reads as follows:

> "Carrying pistol on premises not his own; who may carry pistol.—Except as otherwise provided in this chapter no person shall carry a pistol about his person on premises not his own or under his control; but this section shall not apply to any sheriff or his deputy or police officer of an incorporated town or city in the lawful discharge of the duties of his office, or United States marshal or their deputies, rural free delivery mail carriers in the discharge of their duties as such, bonded constables in the discharge of their duties as such, conductors, railway mail clerks, and express messengers in the discharge of their duties."

In 1936, however, the phrase "except as otherwise provided in this chapter" was not a part of Section 163, supra. In 1936, the "Uniform Firearms Act" was enacted by Act No. 82, General Acts 1936, Extra Session, page 51. Section 22 of this Act repealed all inconsistent acts. It was held that the "Uniform Firearms Act" was intended as an entire revision of the subject matter contained therein, and laws inconsistent therewith were repealed. **Stinson v. State,** 28 Ala. App. 559, 190 So. 303.

However, in the Code of Alabama 1940, the present Section 163 of Title 14, supra, was codified along with Sections 172 through 186 of Title 14 thereof.

In an official opinion dated July 31, 1941 (Quarterly Report of Attorney General, Vol. 24, page 126), it was held that this codification reenacted the present Section 163, supra, as well as the "Uniform Firearms Act" as embodied in Sections 172 through 186, supra. The wording of Section 175, supra, at that time was as follows:

> "Carrying pistol.—No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided."

This opinion of the Attorney General, supra, further held that both Sections 175 and 163 had fields of operation; that Section 175 forbad a person to carry a pistol in a vehicle or concealed without a license; and that Section 163 permitted a person to carry an unconcealed pistol on not only his own premises but on the public highways and publicly owned property. The Supreme Court case of **Isaiah v. State,** 176 Ala. 27, 58 So. 53, clearly supports this holding.

In 1947, Section 175, supra, was amended by Section 3, Act No. 616, General Acts 1947, page 463, to read as follows:

> "No person shall carry a pistol, EITHER OPENLY OR concealed, in any vehicle or on or about his person, except ON HIS LAND, in his own abode or fixed place of business, without a license therefor or hereinafter provided."

This amendment clearly prohibited the carrying of an unlicensed pistol either openly or concealed except on the land, place of abode, or fixed place of business of the person carrying it. Thus, it is apparent that Section 175, as amended, supra, preempted the entire field regulating the carrying of pistols and served impliedly as a pro tanto repeal of Section 163, supra. See, **Steele v. State,** 61 Ala. 213.

In 1951 the Legislature again amended Section 175 of Title 14, supra, relaxing its prohibition considerably. Act No. 784, supra, revised and reenacted Sections 172 through 186, supra. Section 175, the section crucial to the decision of these questions, was amended to read as follows:

> "Carrying pistol.—No person shall carry a pistol, concealed, in any vehicle or on or about his person, except on his land, in his own abode or fixed place of business without a license therefor as hereinafter provided."

Obviously, this section prohibits only the carrying of concealed pistols away from a person's land, abode, or fixed place of business, without a license. No reference is made to unconcealed pistols. Accordingly, the entire field of regulation of pistols having been preempted by Act No. 616, supra, and Section 163 having thus been impliedly repealed, the operation of Section 163, supra, was not revived by the later relaxing of this strict control by virtue of the 1951 amendment of Section 175, supra.

To recapitulate, for the above reasons it is my opinion that a person may carry an unconcealed and unlicensed pistol anywhere, either on his own property, openly in a vehicle, on the public highways, public property or the land of another person without violating either Section 163, supra, or Section 175, as amended, supra. Section 175, as amended, supra, prohibits the carrying of a concealed and unlicensed pistol off the land or place of abode or fixed place of business of the bearer. Therefore, such pistol may not be carried concealed to the premises of another, in a motor vehicle, or on public property. Lastly, a licensed pistol may be carried concealed anywhere if the license be an unlimited one, but if the license be a qualified one, the pistol may be carried only in accordance with the terms of the qualifications on the license. See Sections 177, as amended, supra.

It should be pointed out, however, that the right to carry an unlicensed and unconcealed pistol, or any pistol licensed or unlicensed, concealed or unconcealed, is expressly denied to a person who has been convicted in this State, or elsewhere, of committing or attempting to commit a crime of violence, to a drug addict, or to an habitual drunkard. See Title 14, Section 174, Code of Alabama 1940, as last amended by Act No. 784, General and Local Acts 1951, page 1378.

Yours very truly,

JOHN PATTERSON,
Attorney General.

June 9, 1955

Hon. James T. Beeland
Judge of Probate
Butler County
Evergreen, Alabama

Marriage—Counties—Judges of Probate—Records—Opinions Overruled, Modified or Distinguished.

1. The county governing body, under the provisions of Title 12, Section 123, Code of Alabama 1940, may furnish to the probate judge blank forms used by said judge in making certified copies of his records of marriage certificates.

2. A form used by the probate judge in furnishing a copy of his records pertaining to marriages is "stationery" within the meaning of Title 12, Section 123, Code of Alabama 1940.

3. Opinion of the Attorney General in Quarterly Report of Attorney General, Vol. 39, page 58, overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

On June 2, 1955, you requested this office to reconsider a certain opinion of the Attorney General, rendered to Hon. C. B. Gullatt, Jr., Judge of Probate of Russell County, Phenix City, Alabama, under date of June 25, 1945. This opinion appears in Quarterly Report of Attorney General, Vol. 39, page 58. In that opinion this office held that the county governing body was not authorized to pay for certain blank forms used by the probate judge in furnishing certificates of his records pertaining to marriages to persons asking for certified copies of said records.

I am of the opinion that said holding is in error and should be overruled.

A marriage license is required to be obtained from the judge of probate, and when the minister or person performing the ceremony certifies to this fact upon the license, his return is called a certificate of marriage. See Title 34, Sections 9, 11, 12 and 14, Code of Alabama 1940. The license form and the certificate are supplied by the Bureau of Vital Statistics. Title 22, Section 92, Code of Alabama 1940.

The judge of probate is required to make certain records of marriage licenses issued by him (Title 34, Section 11, code of Alabama 1940), and to record the marriage certificate or return (Title 34, Section 12, Code of Alabama 1940).

Although the probate judge must forward the original marriage license and certificate to the Bureau of Vital Statistics, he must furnish a copy of the record kept in his office upon request. Title 13, Section 280(7), Code of Alabama 1940; Biennial Report of Attorney General, 1936-1938, page 167. In preparing a certified copy of such records kept in the probate office, it appears to be necessary and convenient that the probate judge have certain blank forms.

It is my opinion that it is the duty of the county governing body, under the provisions of Title 12, Section 123, Code of Alabama 1940, to furnish such blank forms to the probate office. Section 123, supra, reads as follows:

> "§ 123. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

In my opinion, such blank forms are included within the term "stationery," as used in Section 123, supra. This office has heretofore held that the county may pay for the printing of blank forms necessary for use in the probate office. See Biennial Report of Attorney General, 1936-1938, page 433. See also, **Board of Revenue and Road Commissioners of Mobile County, et al v. State ex rel Stone, County Treasurer,** 241 Ala. 175, 1 So. 2d. 904; and **Underwood Typewriter Company v. Marengo County Bank,** 203 Ala. 128, 82 So. 158.

The opinion under date of June 25, 1945, appearing in Quarterly Report of Attorney General, Vol. 39, page 58, is, therefore, overruled.

Very truly yours,

JOHN PATTERSON,
Attorney General.

June 30, 1955

Hon. Will O. Walton
Judge, Fifth Judicial Circuit
LaFayette, Alabama

Appeals—Registers—Court Reporters—Transcripts—Costs and Fees —Courts.

1. When an appeal is taken in a suit in equity, it is the duty of the register to notify the court and the court should then order the court reporter to transcribe and file oral testimony.

2. In appeals from decrees in equity, the stenographer or court reporter, in filing transcript of oral testimony with register, is not required to use particular type of paper.

3. In transcribing oral testimony in an appeal in equity, court reporter may use transcript paper and prepare copies. Register may use said transcript for inserting in record on appeal, but register must certify to correctness thereof and is entitled to fees for preparing transcript on appeal.

4. Court reporter is entitled to ten cents per hundred words for the original and five cents per hundred words for copies in transcribing oral testimony in equity proceedings, said fee to be paid by the party requesting the transcription. Court reporter is not required to perform services without payment or assurance thereof.

5. When an appeal is taken from a decree in equity, the court reporter is not required to file a transcript of oral testimony with the register until the fee for transcription is paid, unless register is assured of payment.

6. The transcript on appeal in an equity case must be filed in Supreme Court within sixty days from the date of the taking of an appeal. The court reporter must file with the register transcript of oral testimony in time to enable register to complete transcript on appeal within sixty days.

7. In appeal from decree in equity, transcript on appeal should be filed in the Supreme Court within sixty days from the date of the taking of the appeal, whether supersedeas bond or cost bond is filed.

8. In appeals from decrees in equity, the trial court may grant an extension of time for filing transcript in Supreme Court not to exceed thirty days. Thereafter the Supreme Court may extend the time.

Opinion by Assistant Attorney General Baker.

Dear Sir:

Your request for an official opinion, bearing date of June 3, 1955, is as follows:

"I should like to have an official opinion on the matters hereinafter set out:

"1. In equity cases where the testimony is heard before the court and taken down in shorthand by the court reporter, and the losing party desire to appeal, in what manner and by whom is the court reporter notified to transcribe the testimony?

"2. When the reporter has been notified to transcribe the testimony, on what kind of paper should the testimony be transcribed?

"3. Is it lawful in cases of this kind for the reporter to transcribe the testimony on regular Supreme Court transcript paper, making the required number of copies, such testimony to be inserted in the record by the register in the same manner as in civil and criminal cases?

"4. What is the fee to be charged by the reporter for transcribing such testimony, and by whom and when should it be paid?

"5. In such equity cases, is the appellant required to pay the reporter for transcribing such testimony before the testimony is filed with the register by the reporter?

"6. In equity cases where an appeal is prosecuted and a supersedeas bond has been filed, how long does the reporter have in which to file the testimony with the register? Also, after such testimony has been filed with the register, what is the length of time in which the register may file his record with the Supreme Court?

"7. In all appeals in equity, where no supersedeas bond has been filed, how long does the reporter (have) in which to file the testimony with the register, and after the reporter has been notified to transcribe the testimony? (Parenthesis ours.)

"8. How, and in what manner may the reporter secure an extension of the time in which to file the transcribed testimony with the register?"

In answer to your inquiry numbered 1, it is my opinion that when the unsuccessful party in an equity proceeding desires to appeal and oral testimony has been taken by the court reporter in such proceedings, the unsuccessful party files notice of appeal and executes security for the cost of the appeal or supersedeas bond as required by Title 7, Section 766, Code of Alabama 1940. The appellant then makes application to the register to prepare and deliver to appellant a full and complete transcript of the record and proceedings in the case. Title 7, Section 767, Code of Alabama 1940.

Equity Rule 56 provides in part as follows:

". . . When testimony is given orally under this rule the court trying the case must require the court reporter, or some other competent stenographer acting for him, to take down the testimony as delivered, and may, in its discretion, require it to be transcribed in typewriting, certified to by the stenographer, and filed in the cause. In any such case where appeal shall be taken the court trying the case must require the testimony to be transcribed in typewriting, certified to by the stenographer, and filed in the cause."

When the appellant has filed notice of appeal and executed bond as required by Section 766, supra, he may make application to the register to prepare a complete transcript of the record and proceedings in the cause. Section 767, supra, does not provide whether such application to the register must be in writing or oral. The better practice, in my opinion, would require that application to the register be made in writing, and the application should state that appellant desires the register to make and deliver to him a full and complete transcript of the record and proceedings in the case. The application should also contain the date within which appellant must file his transcript in the Supreme Court. Clearly, it is the duty of the register to make a complete transcript, as required by Section 767, supra. See also, Title 7, Section 772, Code of Alabama 1940; and Title 13, Section 215, Code of Alabama 1940.

When application is received by the register under the provisions of Section 767, supra, it is my opinion that it is his duty to notify the court

which tried the case that an appeal in such case has been taken and that application had been made to the register for a complete transcript. It would then become the duty of the court, under the provisions of Rule 56, supra, to order or require the court reporter or the stenographer to transcribe in typewriting the oral testimony taken in the cause, to certify to the correctness thereof, and file same with the register.

The court reporter, therefore, should be notified or ordered by the court to transcribe testimony after the court has been informed by the register that an appeal has been taken and application made for a complete transcript.

In answer to your inquiry numbered 2, you are advised that when the court reporter has been notified or ordered to transcribe the testimony, the law does not prescribe the kind or type of paper to be used by the reporter in transcribing. Rule 56, supra, requires that the testimony be "transcribed in typewriting," and it is my opinion that the court reporter may use any type of paper that he desires. It should here be stated that Section 3 of Act No. 886, General and Local Acts 1951, page 1527, as amended by Act No. 80, General and Local Acts 1953, page 122 (Title 7, Section 827(1b), 1953 Cumulative Pocket Part, Code of Alabama 1940), requires the court reporter to use transcript paper. It will be noted, however, that said statutes apply only to actions at law. See **Smith v. Bank of Blountsville,** 77 So. 2d 357, and Section 1 of Act No. 886, supra.

In answer to your inquiry numbered 3, it is my opinion that the court reporter in an appeal in an equity proceeding may lawfully transcribe the oral testimony on regular Supreme Court transcript paper and make the required number of copies. Thereafter such testimony may be inserted in the record on appeal by the register in the same manner that the clerk follows in civil and criminal cases. As stated in my answer to your question numbered 2, supra, the law does not prescribe the type or kind of paper to be used by the court reporter in transcribing oral testimony taken in an equity proceeding. When application has been made to the register for a full and complete transcript of the proceedings for the purpose of an appeal in an equity case, under the provisions of Section 767, supra, it is the register's duty to prepare the transcript on appeal, and it is his further duty to prepare said transcript on transcript paper, as required by Rule 21 of the revised Rules of the Supreme Court of Alabama, effective June 1, 1955. It must be remembered that it is the register who is entitled to receive fees for making the transcript on appeal and copies thereof. Title 7, Section 768, Code of Alabama 1940; and Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262. Therefore, if the court reporter chooses to use transcript paper and prepares copies for the purpose of allowing the register to insert the reporter's transcript in the record on appeal, it is necessary for the register to enter into an agreement with the court reporter and the parties to the litigation. See Quarterly Report of Attorney General, Vol. 60, page 63. It is the register's right and duty to prepare the transcript on appeal, as heretofore stated, and it is the duty of the court reporter to transcribe and file with the register, on some

kind of paper, the oral testimony. In the absence of an agreement otherwise, the register must recopy the court reporter's transcript filed in the cause when the register makes his complete transcript. An agreement can be made, however, between the register and the court reporter and the parties who must pay costs for the court reporter to use transcript paper and make the necessary number of copies so that this transcript may be inserted in the transcript on appeal to be prepared by the register. If such an agreement is made, however, it is the duty of the register to certify that the transcript on appeal, by whomever prepared, is a complete transcript of all of the proceedings in the cause. Section 767, supra.

In answer to your inquiry numbered 4, it is my opinion that the fee to be charged by the court reporter for transcribing oral testimony is prescribed by Title 13, Section 263, Code of Alabama 1940, at the rate of ten cents for each one hundred words, and for each copy made at the same writing five cents for each one hundred words. This fee should be paid by the party requesting the transcript, and in the case described by your inquiry, the unsuccessful party, appellant. The time for paying such fee is prescribed by Section 263, supra. This section provides in part as follows:

> ". . . but such court reporter shall not be required to perform any part of such service until the payment or security thereof is assured."

The court reporter may, therefore, demand payment from the party requesting the transcript before he performs any service and, of course, before the reporter files the transcribed testimony with the register. See Quarterly Report of Attorney General, Vol. 48, pages 158, 163; Vol. 46, pages 5, 8. On the other hand, the court reporter, if he so desires, may transcribe the testimony if the party requesting the same satisfies the court reporter that the fees therefor will be paid at a time agreeable to the court reporter and the party requesting the transcript.

Your inquiry numbered 5 has been answered with inquiry numbered 4, supra.

Your questions numbered 6, 7 and 8 may be answered together. Both Rule 37, revised Rules of the Supreme Court of Alabama, effective June 1, 1955, and Title 7, Section 769, Code of Alabama 1940, require the transcript on appeal in an equity case to be filed with the clerk of the Supreme Court "within sixty days from the date of the taking of the appeal." See also, Quarterly Report of Attorney General, Vol. 70, page 32. There is no particular time prescribed by statute or rule within which the reporter must file his transcript with the register, but since the register must file the transcript on appeal with the clerk of the Supreme Court within sixty days from the date of the taking of the appeal, it is my opinion that the court reporter must file his transcript with the register at a time early enough to enable the register to copy the court reporter's transcript and complete the record on appeal in time for said record to be filed with the clerk of the Supreme Court within sixty days from the date of the taking of the appeal. The time for filing the transcript on appeal in an equity case with the clerk of the Supreme

Court is sixty days from the date of the taking of the appeal, whether the appeal is taken by the filing of a bond for costs or a supersedeas bond. Title 7, Sections 766, 792-795, Code of Alabama 1940.

I find no specific provision of law authorizing the court reporter to secure an extension of the time in which to file the transcribed testimony with the register. As previously stated, there is no specific time within which the reporter must file his transcript with the register, but there is a specific time within which the transcript on appeal must be filed in the Supreme Court, sixty days from the date of the taking of the appeal. Rule 37, supra, provides in part as follows:

> "The trial judge may extend the time for filing transcript of the record in this court for good cause shown for not to exceed thirty days. Thereafter the time for filing in this court may be extended only by this court for good cause shown upon petition in writing of which adversary counsel must have ten day's notice. A copy of any order of trial judge extending the time for filing transcript shall be filed by appellant in this court within five days from the date of such order."

If it appears that the court reporter will be unable to transcribe and file the testimony with the register soon enough to allow the register to copy said transcript and have it ready for filing in the Supreme Court within sixty days from the date of the taking of the appeal, it is my opinion that the appellant may move the trial judge to extend the time for filing the record on appeal in the Supreme Court. The trial judge may for good cause shown order an extension of thirty days. Such order would have the effect of granting the court reporter more time to finish his transcript. Further extension of time, as provided for in Rule 37, supra, must be applied for and granted by the Supreme Court.

Very truly yours,

JOHN PATTERSON,
Attorney General.

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